92-1608

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

LORETTA BOWMAN and WILLIAM H. BOWMAN, WILLIAM H. BOWMAN JR., THOMAS BOWMAN, SUSAN BOWMAN, JOHN BOWMAN and JOSEPH BOWMAN

—Petitioners

vs.

CITY OF FRANKLIN, J. C. ZIMMERMAN ENGINEERING CORP., WASTE MANAGEMENT OF NORTH AMERICA, INC., and WASTE MANAGEMENT OF WISCONSIN, INC.

—Repondants

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Rule 56 requires conversion of a motion to dismiss where the district court considered "extensive submissions" in addition to those set forth in the 12(b)(6) motion.

2. Whether petitioners were denied an opportunity to submit evidence that defendants Franklin and Waste entered into a written contract to install a sewer for Waste's exclusive use which was secretly assessed ($51,000) against petitioners without notice or hearing.

3. Whether there is a conflict between the 2nd and 7th Circuit as to municipal indifference to illegality.

4. Whether there is a conflict between the District Court and the 7th Circuit as to whether the $51,000 secret assessment was made.

5. Whether federal courts have jurisdiction to determine legality of municipal assessments.

6. Whether the record of Waste's violations should have been stricken.

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LORETTA BOWMAN and WILLIAM H. BOWMAN, WILLIAM H. BOWMAN JR., THOMAS BOWMAN, SUSAN BOWMAN, JOHN BOWMAN and JOSEPH BOWMAN

—Petitioners

vs.

CITY OF FRANKLIN, J. C. ZIMMERMAN ENGINEERING CORP., WASTE MANAGEMENT OF NORTH AMERICA, INC., and WASTE MANAGEMENT OF WISCONSIN, INC.

—Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioners, LORETTA BOWMAN et al., respecfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of plaintiffs' complaint, which sought to remedy defendants' conspiring to:

> levy a secret sewer assessment against plaintiffs without notice or hearing, for the sole use and benefit of defendant WASTE MANAGEMENT.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as LORETTA BOWMAN, WILLIAM H. BOWMAN, WILLIAM H. BOWMAN JR., et al., V. CITY OF FRANKLIN, J. C. ZIMMERMAN ENGINEERING CORPORATION, WASTE MANAGEMENT OF WISCONSIN INCORPORATED, et al., 980 F. 2nd 1104 (7th Cir. 1993) and appears in Appendix A to this petition. The unpublished written opinion of the District Court for the Eastern District of Wisconsin appears in Appendix B to this petition. The Court of Appeals denial of a motion for rehearing appears in Appendix C to this petition.

JURISDICTION

The Court of Appeals opinion in this matter was filed on December 2, 1992. A timely petition for rehearing was filed. The Court of Appeals denial of the petition for rehearing was issued on January 4, 1993 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments V and XIV to the United States Constitution are set forth in Appendix D along with 42 U.S.C. 1983 and 1985.

Section 66.60 (12) (a); (12) (e) and 66.60 (15) of the Wisconsin Statutes are set forth in Appendix E.

STATEMENT OF THE CASE

Petitioners brought this action in the United States District Court for the Eastern District of Wisconsin against three defendants: Waste

Management of Wisconsin and its parent company, Waste Management of North America, Inc. (collectively "Waste"); the City of Franklin ("Franklin"); and J.C. Zimmerman Engineering Corp. ("Zimmerman"). The complaint sounded in four counts: Counts I and II allege violation of the petitioners' Federal rights under the Fifth and Fourteenth Amendments and 42 U.S.C. sects. 1983 and 1985(3) respectively; Counts III and IV allege violations of state law for trespass and interference with prospective business relations.

Franklin and Zimmerman answered the complaint, and Waste filed a motion to dismiss under Rule 12(b)(6). Zimmerman filed a motion for summary judgment under Rule 56. In a conference call on Waste's motion to dismiss, the district court stated that it had reviewed extensive written materials submitted by Waste (see P. 19, 20, 27 of Transcript, Nov. 25, 1991) and, without converting the motion to dismiss into a motion for summary judgment under Rule 56, summarily dismissed both the Federal and state claims, with prejudice, as to all defendants, pursuant to Rule 12(b)(6).

The factual basis of petitioners' complaint consists of allegations concerning the improper placement of a public sewer under petitioners' property, improper tax assessments pertaining to the sewer, and a conspiracy among the defendants to increase the burden of sewer easements on property owners by allowing industrial waste to pass through easements granted for sanitary sewers. In addition, petitioners allege in their state claims (1) an invalid easement due to insufficient signatures by the property owners, and (2) interference with prospective business relations due to the decrease in property value if hazardous industrial waste is transported through sewers on petitioners' property.

The Seventh Circuit affirmed the Rule 12(b)(6) dismissals by the district court, even though it noted that the district court strayed

from the general rule that when Federal claims are dismissed the district court ought to decline jurisdiction over remaining state claims. The Seventh Circuit ignored the factual allegations in the complaint, pertaining to insufficient signatures on the document granting the easement, in affirming dismissal of the state claims. In addition, the Seventh Circuit failed to note that the district court had considered extensive written materials submitted by Waste and that the district court did not convert the Rule 12(b)(6) motion to dismiss to a motion for summary judgment under Rule 56, as required by Rule 12 when extraneous materials are considered by a court in ruling on a motion to dismiss. The Seventh Circuit also affirmed the district court's sua sponte dismissal of Franklin and Zimmerman under Rule 12(b)(6), even though those defendants had answered the complaint and Zimmerman had recently filed a motion for summary judgment; petitioners were thereby denied the opportunity to submit any evidence in support of their claims.

Franklin's Municipal Indifference to Law

Franklin's municipal indifference is shown in the signed contract between Franklin and Waste. (Complaint, Exhibit 11) Franklin got $600,000.00 plus other consessions to connect Waste to the municipal sewer, through petitioner's land. The contract provides hold harmless agreement:

> par. 14 "...Waste shall defend the City from and against any and all liability, claims, loss, damages, interest, actions, suits, judgements, costs, expenses, attorney's fees and the like which in any manner results from or arises in the course of, out of or as a result of the performance of this agreement..."

No court need fear any claim against Franklin's citizens. Waste will pay it.

Franklin's violations of federal and state law became, to Franklin, inconsequential.

Application of Wisconsin Statutes

Wisconsin statutes give sole jurisdiction over the validity of assessments to the local circuit court to which a complete record of "all the papers in the matter," are to be transmitted by the municipal clerk. Section 66.60 (12)(a) Wisconsin Statutes.

An assessment levied under Section 66.60, is a lien against the owners' property.

Petitioners won an appeal testing the validity of the $89,000.00 assessment, the only assessment they or the state circuit court knew of. (Complaint, Exhibit 15) No damages are provided in Wisconsin. Damages were sought in federal court.

The Easement and the Assessment

The easement was given for public sanitary sewer by only one of the two owners. It was used by Franklin to install a private sewer for Waste Management, without any notice or hearing. The public records were concealed from petitioners. (Complaint, p. 5; Exhibit 7)

Petitioners were assessed $89,000.00 for public sewers along highways. They were secretly assessed an additional $51,000.00 for private sewer for Waste's exclusive use along the easement.

Almost two years after the $51,000.00 sewer was installed on the petitioner's land, the secret assessment of $51,000.00 was discovered. (Complaint, pp. 4, 5 and 6; Exhibit 6, attached to complaint)

The assessment for Waste's sewer is made specifically against petitioner's property, contrary to the agreement not to assess contained in the assessment.

Franklin's mayor admitted that the $51,000.00 assessment was made but deferred. (Comlaint, p.7; Exhibit 14) The district court agreed. The Court of Appeals stated that the assessment was never made because of the agreement not to assess in the easement, and then affirmed the district court judgement.

Zimmerman's Official Position

Zimmerman's involment in the state process was described in its report. (Compaint, p.4; Exhibit 5, p.1) It was the "authorized representative" of the City of Franklin.

Supplemental Reports on Waste Management Pursuant to Fed. R. App. P. 28j

Two reports were submitted to expand on allegations of conspirancy deprive petitioners of consitutional rights and property in paragraph 20 of the compliant, and to justify discovery,

1. The report of the District Attorney of San Diego County, California is dated March 1992, after the District Court hearing on motion to dismiss held Novemebr 25, 1991 consisting of 58 pages, it includes chapter on:
    A. Organized crime connection (p. 21) including a description of activites in Milwaukee, Wisconsin, dating back to 1962.

B. Public corruption, p. 22 Records of arrests and convictions of criminal offenses by Waste Management are listed:

a. 1985: Manager of a Waste Management subsidiary convicted, jailed and fined for bribing the mayor of Fox Lake, Illinios.

b. 1987: A lobbyist and marketing representative of Waste was arrested and convicted of bribing a Chicago alderman to acquire land for a waste transfer facility.

2. The report of the Sheriff of Ventura County, California lists complaints against Waste and convictions involving bribery and anti-trust violations including bid rigging, price fixing and price gouging.

Granting the motion to dismiss deprived petitioners of discovery based on the California reports.

There were official reports citing judgements and convictions, not mere newspaper reports mentioned in Trans Sterling Inc. v. Bible, 814 F(2) 505 (9th Cir. 1986).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Opinion below conflicts, by implication, with previous decisions of this Court, and also conflicts with decisions of other Circuits.

Improper Dismissal with Prejudice of State Claims

This court has implicitly held that when a Federal court dismisses all Federal claims in a case, before trial, then the court should decline to exercise jurisdiction over remaining state claims, in the interest of comity. United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1965). The Sixth Circuit has adopted this as a general rule in Gaff v. Federal Deposit Ins. Corp., 814 F.2d 311, 319 (6th Cir. 1987), finding error by a district court in retaining jurisdiction over state law claims for the purpose of dismissing them with prejudice after disposing of federal question claims by a Rule 12(b)(6) motion, as the district court below has done in the instant case. In the present case the district court summarily concluded that a state claim for trespass could not stand based on the theory of a sewer line crossing petitioners' property, without reference to the allegations of the complaint that the sewer easement was invalid without proper signatures of the landowners. The district court likewise failed to consider the allegations of interference with prospective business relations based on the claims of an increased burden on the property owners resulting from the conversion of a sanitary sewer to one transporting hazardous industrial waste. In fact, defendants Franklin and Zimmerman had answered the complaint without challenging the sufficiency of plaintiffs' complaint. In conclusion, dismissal of the state claims with prejudice was an improper exercise of jurisdiction by the district court.

Improper Consideration of Extraneous Materials in Ruling on a Motion to Dismiss

This Court has held that when matters outside the pleadings are presented and not excluded by the court, then the court is required by Rule 12(b) of the Federal Rules of Civil Procedure to treat a

motion to dismiss as one for summary judgment and to dispose of it as provided in Rule 56. Carter v. Stanton, 405 U.S. 669, 671 (1971). The Fifth Circuit has likewise held that when a district court states that it has "reviewed the record" in ruling on a dismissal under Rule 12(b)(6), the motion to dismiss must be treated as a motion for summary judgment, and the proceedings must comport with the hearing and notice requirements of Rule 56(c). Partridge v. Two Unknown Police Officers, 751 F.2d 1448, 1451 (5th Cir. 1985). See also, Kopec v. Coughlin, 922 F.2d 152 (2nd Cir. 1991) (holding that Rule 12(b) does not vest in the district court the authority to consider matters outside the pleadings and summarily to designate them "uncontroverted"); LaBounty v. Adler, 933 F.2d 121 (2nd Cir. 1991); and Fonte v. Board of Mgrs. of Continental Towers Condo., 848 F.2d 24 (2nd Cir. 1988).

In the present case the district court noted several times, in ruling on Waste's motion to dismiss, that it had reviewed the extensive written materials submitted by Waste. (See transcript of Nov. 25, 1991 telephone conference.) The court opined: "Having cut through all of the felgergarb, it becomes more than apparent to this court that the Bowmans are displeased because they are unable, at least at the moment, to sell their property unless they go about developing it themselves; and in that event they will be obliged to pay the trunk sewer assessment." (Id., at p. 29). Clearly the court deviated from its duty to consider only the pleadings in ruling on a motion to dismiss and to construe the facts alleged in the complaint favorably to the pleader. When a federal court reviews the sufficiency of a complaint, the issue is not whether a plaintiff will ultimately prevail but whether he is entitled to offer evidence to support the claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1973). See also, Neitzke v. Williams, 490 U.S. 319 (1988) (Rule 12(b)(6) dismissal improper based on judge's disbelief).

Petitioners maintain that the complaint adequately states a claim against all defendants based on the deliberate indifference of Franklin in hiring Zimmerman, who also contracted with Waste, as to the constitutional rights of Franklin's citizens, such as might subject Franklin to liability under 42 U.S.C., sects. 1983 and 1985. See, Walker v. City of New York, 974 F.2d 293 (2nd Cir. 1992). Franklin and Zimmerman had answered the complaint and Zimmerman had recently filed a motion for summary judgment.

Improper Sua Sponte Dismissal of Claims against Other Defendants

Defendants Zimmerman and Franklin had both answered the complaint and Zimmerman had recently filed a motion for summary judgment when the district court sua sponte dismissed petitioners' claims against all defendants in telephone conference on Waste's motion to dismiss. Petitioners had received no notice that the court would dismiss the complaint as to Franklin and Zimmerman and the conference hearing was held only as to Waste's motion to dismiss. Both the First and Second Circuits have held that a sua sponte dismissal without notice is improper and that the plaintiff must be given an opportunity to be heard. Thomas v. Scully, 943 F.2d 259 (2nd Cir. 1991); Fredyma v. AT & T Network Systems, Inc., 935 F.2d 368 (lst Cir. 1991). No cases were found where the court dismissed a complaint sua sponte after defendants had answered the complaint. Clearly where both Franklin and Zimmerman had filed answers to the complaint, even the defendants did not dispute the adequacy of the complaint. Petitioners maintain that the district court's dismissal sua sponte as to Franklin and Zimmerman, without notice, was legally improper .

This Court should grant certiorari here to explicitly rule that Federal courts should decline to exercise jurisdiction over state

claims after Federal claims have been dismissed before trial, to resolve the conflict between the Circuits created by the Seventh Circuit's decision in this matter, and to further rule that the failure to convert a motion to dismiss to a motion for summary judgment when extraneous matters were considered and the sua sponte dismissals of Franklin and Zimmerman were erroneous in this instance.

Jurisdiction Over Validity of Assessment Is Granted to State Court Exclusively

Section 66.60 (12) Wisconsin Statutes grants jurisdiction exclusively to state circuit courts. This is the only remedy petitioners have to correct illegality of the assessments. Section 66.60 (12)(e)

In federal court, petitioners sued for damages, which are not granted under state law. (Complaint, Exhibit 15)

The Federal District Court ruled that the secret assessment was valid, and would have to be paid.

The Court of Appeals appears to rule that the secret assessment was not made, but could become a lien ander section 66.6 (15) Wisconsin Statutes. It then affirmed the District Court judgement.

Petitioners pray that the validity of the $51,000.00 secret assessment be left to the state courts, and that damages for taking property without regard for notice, hearing and due process be assessed by federal courts.

The Easement and the Assessment

The City installed a private sewer for Waste's exclusive use. It was not public sanitary sewer described in an easement signed by only one of the two owners. (Complaint, p.10; Exhibit 17) The former mayor of Franklin admitted that the second owner refused to

sign the easement.

The secret assessment was for a private sewer to carry Waste's toxic leachate through plaintiff's farm.

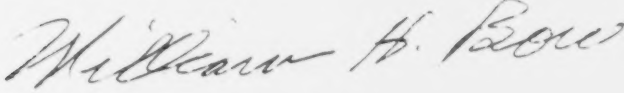
Contrary to the terms of the easement, it was secretly assessed against petitioners without prior notice or hearing.

If the owners of an easement "exceeds his rights either in the manner or in the intent of its use, he becomes a trespasser to the extent of the unauthorized use." 25 American Jurisprudence 2d, Easements, p. 74, p.479 (1966)

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

Dated April 1, 1993
Respectfully Submitted



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Loretta BOWMAN, William H. Bowman, William H. Bowman, Jr., et al., Plaintiffs-Appellants,

v.

CITY OF FRANKLIN, J.C. Zimmerman Engineering Corporation, Waste Management of Wisconsin, Incorporated, et al., Defendant-Appellees.

No. 91-3887.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 20, 1992.
Decided Dec. 2, 1992.
Rehearing Denied Jan. 4, 1993.

Property owners brought civil rights action against city landfill operator, and engineer who consulted on installation of sewer line running through owners' property. The United States District Court for the Eastern District of Wisconsin, J.P. Stadtmueller, J., dismissed action. Property owners appealed. The Court of Appeals, Eschbach, Senior Circuit Judge, held that property owners failed to state cause of action under § 1983 or for civil rights conspiracy .

Affirmed.

1. Federal Courts 776

Court of Appeals reviews de novo a motion to dismiss for failure to state a claim and affirms such dismissals only if plaintiff has failed to allege any set of facts upon which relief may be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Courts 794

In reviewing ruling on motion to dismiss for failure to state a claim, Court of Appeals takes as true all well-pleaded factual allegations and all reasonable inferences which may be drawn from those factual allegations. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

APPENDIX A

3. Civil Rights 234

To state § 1983 cause of action, plaintiffs must allege that they were deprived of right secured by Constitution or laws of United States and that deprivation was visited upon them by a person acting under color of state law. 42 U.S.C.A. § 1983.

4. Civil Rights 198(4)

Landfill operator and consulting engineer on project involving installation of sewer line were not proper defendants in § 1983 action brought by owners of property through which portion of sewer line ran; both were private parties and property owners failed to establish that operator and engineer acted in conspiracy with state defendants. 42 U.S.C.A. § 1983.

5. **Civil Rights** ~236

For a § 1983 complaint to state cause of action against private defendants on ground that they acted in conspiracy with state defendants, complaint must contain more than mere conclusory allegations of conspiracy; factual basis for allegations must be provided. 42 U.S.C.A. § 1983.

6. Civil Rights 235(1)

Property owners failed to state § 1983 cause of action aga;nst city based on alleged illegal tax assessments in the absence of any allegation that taxes were imposed either in discriminatory manner or contrary to procedures provided by Wisconsin law. 42 U.S.C.A. § 1983.

7. Federal Courts 13.10

Property owners' § 1983 claim regarding alleged pollution of their property due to city having sewer line run through their property was not ripe; property owners alleged no actual injury. 42 U.S.C.A. § 1983.

8. Conspiracy 18

To state claim for civil rights conspiracy, complaint must allege conspiracy for purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of laws or of equal

privileges and immunities under laws and act in furtherance of conspiracy whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. 42 U.S.C.A. § 1985(3).

9. Conspiracy 7.5

To assert requisite animus for civil rights conspiracy claim, plaintiffs must be able to identify a class with common characteristics that raises inference that they might be protected by civil rights conspiracy statute. 42 U.S.C.A. § 1985(3).

10. Conspiracy 18

Property owners failed to state civil rights conspiracy claim based on installation of sewer line through their property in the absence of allegation that they were part of a class that shared any common racial or other class-based characteristics. 42 U.S.C.A. § 1985(3).

11. Federal Courts 18

Generally, when all federal claims are dismissed before trial, district court should relinquish jurisdiction over any pendent state claims as well.

12. Federal Courts 18

District court did not abuse its discretion when, after it dismissed federal civil rights claims, it found that property owners' pendent state law claims based on installation of sewer line through their property were without merit and had to be dismissed; property owners' easement indenture granted temporary easement for installation of sewer and property owners cited no authority for proposition that wastes flowing through sewer under property would constitute trespass.

13. Federal Civil Procedure 2839

To award sanctions under circuit rule, Court of Appeals must determine that appeal is frivolous and sanctions are appropriate. U.S.Ct. of App. 7th Cir.Rule 38, 28 U.S.C.A.

14. Federal Civil Procedure 2842

Sanctions would not be imposed under local circuit rule on property owners for appealing order dismissing their civil rights and state law action for failure to state a claim; property owners did not display bad faith in appeal, but rather, made serious attempt to address legal and factual errors that they believed district court made. U.S.Ct. of App. 7th Cir.Rule 38, 28 U.S.C.A.

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James L. Kirschnik, Patrick R. Burns, Machulak & Hutchinson, Brookfield, Wis., for J.C. Zimmerman Engineering.

Cordelia S. Munroe (argued), David S. Branch, Friebert, Finerty & St. John, Milwaukee, Wis., for Waste Management of Wisconsin Inc., and Waste Management of North America, Inc.

Before BAUER, Chief Judge, POSNER, Circuit Judge, and ESCHBACH, Senior
Circuit Judge.

ESCHBACH, Senior Circuit Judge.

The Bowmans, Plaintiffs-Appellants, brought this action under 42 U.S.C. §§ 1983 and 1985 against the City of Franklin ("Franklin"), J.C. Zimmerman Engineering Corp. ("Zimmerman"), Waste Management of Wisconsin, Inc. and its parent company, Waste Management of North America, Inc. (collectively, "Waste") seeking injunctive and monetary relief for purported violations of their civil rights as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. The factual basis of the suit is the installation of a sewer line, a portion of which runs through the Bowmans' property, and the recording of assessments related to that installation. The Bowmans asserted that the sewer line and the assessments were the product of a conspiracy among the defendants to interfere with their property rights by imposing illegal

taxes on the Bowmans, polluting the Bowmans' property and taking the property for the private use and benefit of Waste. In addition to the federal counts, the Bowmans included pendent claims, presumably under Wisconsin tort law, alleging both trespass and an interference with prospective purchasers of their property. The district court dismissed all counts of the Bowmans' complaint as to all defendants pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief may be granted. We have jurisdiction over the appeal of this final disposition pursuant to 28 U.S.C. § 1291. We affirm. We also deny defendants' request for sanctions under Fed.R.App.P. 38 and Circuit Rule 38.

I.

First, we review the history of the defendants' association with each other because the Bowmans attempt to use this history to allege a conspiracy among the defendants. Franklin embarked on a series of civic improvements that resulted in their retention of Zimmerman as consulting engineer on the installation of Franklin's Central City Sewer (the "CCS"), which would ultimately connect with the Milwaukee Metropolitan Sewerage District (the "MMSD").

Waste formally requested that Franklin connect Waste's Metro Landfill, located in Franklin, to the CCS as an alternative method of transporting leachate produced in the landfill to the MMSD. Waste had been trucking the leachate to a MMSD treatment plant at relatively high cost. At roughly the same time, Waste, with Franklin's knowledge, retained Zimmerman as its project engineer to construct the force main necessary to connect to the CCS. Waste agreed to pay for modifications to the CCS necessary to accommodate Waste's use. Waste also agreed to construct the force main at its own expense and "dedicate ownership" of it to Franklin. Finally, Waste agreed to pay a connection fee of $600,000.00 and a continuing annual fee of $120,000.00 to Franklin's general operating fund, which would be used to reduce future property tax assessments.

The Bowmans' involvement with the CCS project began when William H. Bowman granted an easement to Franklin for the construction of a sanitary sewer through the Bowmans' property.

The easement indenture states: "[n]o special assessments shall be levied against subject property for any sanitary sewer and appurtenances erected on said easement." R. 30 at Ex. A.

A report on special assessments prepared by Zimmerman included an assessment of $89,321.09 for the CCS in the public right of way abutting the Bowmans' property. R. 27 at Ex. B. The Bowmans appealed this $89,321.09 assessment to the Milwaukee County Circuit Court, which determined that there had been an error in computation and annulled the assessment. By resolution, Franklin reenacted the assessment, reducing it to $82,407.59. R. 1 at Ex. 12. A second $51,187.00 assessment for the CCS on the Bowman property was recorded by Franklin, but was never charged to the Bowmans pursuant to the term of the easement indenture. R. 1 at Ex. 6. Because it was never billed, the Bowmans refer to this second assessment as a "secret" assessment.

The Bowmans then filed a complaint in federal district court, the dismissal of which is the subject of this appeal. In response to the Bowmans' complaint, Waste moved to dismiss all claims against them for failure to state a claim on which relief can be granted under Fed.R.Civ.P. 12(b)(6). Both of the remaining defendants, Franklin and Zimmerman, answered the complaint. In addition to filing its answer, Zimmerman moved for summary judgment pursuant to Fed.R.Civ.P. 56 and for sanctions pursuant to Fed.R.Civ.P. 11 or, in the alternative, attorney's fees pursuant to 42 U.S.C. § 1988.

At a hearing on Waste's motion to dismiss, the district court granted the motion, dismissing with prejudice. On its own motion, the district court also dismissed the Bowmans' complaint with prejudice as to Franklin and Zimmerman. Finally, the district court denied Zimmerman's alternative motions for sanctions and attorney's fees. In this appeal, the Bowmans challenge the dismissals. Zimmerman has not challenged the denial of its motion for sanctions and attorney's fees by the lower court, although all defendants have requested that sanctions be imposed by this Court under Fed.R.App.P. 38 and Circuit Rule 38. Lastly, the Bowmans attempted to place additional evidence before us shortly before oral

argument. Defendant Waste made a motion to strike this evidence, which we are hereby granting.1

II.

[1, 2] We review dismissals under Rule 12(b)(6) *de novo*, *Bethlehem Steel Corp. v. Bush*, 918 F.2d 1323, 1326 (7th Cir.1990), and we affirm such dismissals "only if the plaintiff has failed to allege any set of facts upon which relief may be granted." *Yeksigian v. Nappi*, 900 F.2d 101,102 (7th Cir.1990). In undertaking such a review, we take as true all well-pleaded factual allegations and all reasonable inferences which may be drawn from those factual allegations. *Leahy v. Board of Trustees of Community College District No. 508*, 912 F.2d 917 (7th Cir.1990). Mindful of these standards, we address each legal basis for federal relief asserted by the Bowmans separately.

A. *Section 1983*

[3] It appears from their *pro se* pleadings that the Bowmans have alleged various violations of their property rights, presumably under the Fifth and Fourteenth Amendments, which they claim are actionable under 42 U.S.C. § 1983.2 To state a claim under § 1983, the Bowmans must allege: (1) that they were deprived of a right secured by the Constitution or laws of the United States, and (2) that the deprivation was visited upon them by a person acting under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980). All of the Bowmans' claims suffer from fatal weaknesses under one of the above prongs; many fail under both prongs.

[4,5] Examining first the state action requirement of a § 1983 claim, we note that Waste and Zimmerman are private parties, not state actors. As such they may be subject to liability under § 1983 only if they wilfully participate in a conspiracy with the state or one of its agents. *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336,1352 (7th Cir.1985). A complaint must contain more than mere conclusory allegations of such a conspiracy; a factual basis for such allegations must be provided. *Leahy*, 912 F.2d at 922. The facts that the Bowmans do provide are insufficient to establish a conspiracy at

all, much less a conspiracy that aims to deprive the Bowmans of their constitutional rights.

For example, Waste's agreement with Franklin to connect to the CCS did not have any impact on the actions Franklin took with regard to the Bowmans. It did not alter the route that the sewer was to take through the Bowmans' property or the extent of the easement. Franklin's sole accommodation of Waste was the provision of an additional lining, which was done entirely at Waste's expense, thus having no effect on the assessments against the Bowmans' property. Similarly, Franklin's relationship with Zimmerman did not affect its actions toward the Bowmans, despite the fact that Zimmerman did much of the design work for the sewer and prepared the reports that Franklin used in determining the amount of the assessments. The mere fact that Zimmerman acted as consulting engineers on this project is insufficient to establish state action as "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841, 102 S.Ct. 2764, 2771, 73 L.Ed.2d 418 (1982). Therefore, Waste and Zimmerman are not proper § 1983 defendants.

Franklin acted pursuant to Wisconsin Statute § 66.60 in assessing the Bowmans for the sewer. Accepting as true the allegation that this assessment qualifies as state action to state a claim under § 1983, the Bowmans must additionally allege that defendants' conduct deprived them of a right secured by the Constitution or laws of the United States. *Gomez*, 446 U.S. at 640, 100 S.Ct. at 1923. The Bowmans conclude in their complaint that their property rights have been violated, presumably under the Fifth and Fourteenth Amendments, but they do not allege how this has occurred. The specific conclusions that we can glean from the Bowmans' complaint are that the defendants have interfered with the Bowmans' property rights by imposing illegal taxes, polluting their property and taking the property for the private use and benefit of Waste, but none of these conclusions are supported by facts that make them cognizable Constitutional claims.

[6,7] First, regarding the illegality of the tax assessments, the Bowmans do not allege that the taxes were imposed either in a discriminatory manner or contrary to the procedures provided by Wisconsin law. Thus, the Bowmans cannot state a § 1983 claim arising from these facts under the equal protection or the due process clauses of the U.S. Constitution.[3] *See Kasper u Larson,* 372 F.Supp. 881 (E.D.Wis.1974). Second, the alleged pollution of the Bowmans' property is speculative at present. The Bowmans have alleged no actual injury. As such, this cannot be the source of a ripe claim for damages under § 1983. Finally, the Bowmans' contention that their property was taken through a conspiracy for the private use and benefit of Waste is contrary to the facts contained in the documents attached to the Bowmans' complaint. Neither the use of their land nor the amount of their assessments has been altered by Waste's involvement, and Waste has and will continue to pay for their use of the CCS. For these reasons, none of the Bowmans' allegations make out a claim under 42 U.S.C. § 1983.

B. *Section 1985*

[8] The Bowmans also attempt to state a claim under 42 U.S.C. § 1985. Though they do not specify which subsection is applicable, only subsection (3) is at all related to the Bowmans' allegations.[4] To state a claim under § 1985(3), a complaint must allege:

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States. *United Brotherhood of Carpenters and Joiners, Local 610 v. Scott,* 463 U.S. 825, 828-29,103 S.Ct. 3352, 3355-56, 77 L.Ed.2d 1049 (1983), citing *Griffin v. Breckenridge,* 403 U.S. 88, 102-03, 91 S.Ct. 1790, 1798-99, 29 L.Ed.2d 338 (1971). The *Griffin* Court specifically stated that the second element required "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action," though it did not decide "whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be

actionable" under § 1985(3). 403 U.S. at 102 & n. 9, 91 S.Ct. at 1798 & n. 9.

[9,10] In order to assert the requisite animus, plaintiffs must be able to identify a class with common characteristics that raises the inference that they might be protected under § 1985(3). The Bowmans allege that they are part of a "trunk sewer class," but they do not allege that this class shares any common racial or other class-based characteristics.[5] The most that the Bowmans could assert is that they are linked to the remainder of the class by ownership of land in the same geographic area. However, § 1985(3) does not reach bias based on economic status.[6] *Scott*, 463 U.S. at 83738, 103 S.Ct. at 3360-61. Even if the defendants' actions against the Bowmans could somehow be viewed as political, "§ 1985(3) does not reach nonracial political conspiracies." *Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir.1985). Therefore, because the Bowmans have failed to allege racially-motivated discriminatory animus behind defendants' conduct, their § 1985(3) claim must be dismissed.

C. State Claims

[11,12] The Bowmans alleged two state claims in their complaint: (1) that the installation of the sewer and the flow of Waste's leachate through it amounts to an ongoing trespass on their property and (2) that defendants' actions have caused prospective purchasers to lose interest in the property. Generally, when all the federal claims are dismissed before trial, the district court should relinquish jurisdiction over any pendent state claims as well. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966). Instead of relinquishing jurisdiction by dismissing without prejudice, however, Judge Stadtmueller made a determination on the merits by dismissing *both* the federal and state claims with prejudice. This action represents a recognized exception to the general rule stated above: "[I]f it is absolutely clear that the pendent claim[s] can be decided in only one way, the district judge can and should decide [them], to save the time of the state court." *Martin-Trigona v. Champion Federal Sav. & Loan Ass 'n*, 892 F.2d

575, 578 (7th Cir. 1989). *Martin-Trigona* indicates that we review such a determination under an "abuse of discretion" standard. *Id.* Judge Stadtmueller did not abuse his discretion by finding that the Bowmans' pendent state claims could be decided in only one way, because they are without merit. First, the Bowmans' easement indenture grants a temporary easement for the installation of the sewer. R. 30 at Ex. A. Second, the Bowmans cite no authority for the untenable proposition that wastes flowing through a sewer under a person's property constitutes a trespass. Finally, we cannot identify any known claim for relief under Wisconsin law that will support the Bowmans' interference claim. For these reasons, we find that Judge Stadtmueller was correct to dismiss the Bowmans' state claims with prejudice.

D. Sanctions

[13,14] The defendants have requested that sanctions be entered against the Bowmans under Fed.R.App.P. 38 and Circuit Rule 38. To award Rule 38 sanctions, we must determine that (1) the appeal is frivolous and (2) sanctions are appropriate. A*Abart Elec. Supply Inc. v. Emerson Elec. Co.*, 956 F.2d 1399, 1406 (7th Cir.1992). Though the question of whether this appeal is frivolous is a very close one, even taking note of William Bowman's *pro se* status, we do not find that sanctions are appropriate in this case. In making the determination of whether sanctions are appropriate, "[t]ypically the courts have looked for some indication of the appellant's bad faith suggesting that the appeal was prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or out of sheer obstinacy." *Reid v. United States*, 715 F.2d 1148, 1155 (7th Cir.1983). The Bowmans have not displayed bad faith in this appeal, but rather have made a serious, though unpersuasive, attempt to address legal and factual errors that they believed the district court made, in contrast to *pro se* appellants who have been sanctioned in the past. *See, e.g., Reis v. Morrison*, 807 F.2d 112, 113 (7th Cir.1986); *Bacon v. American Federation of State, etc.*, # 13, 795 F.2d 33, 35 (7th Cir.1986). For this reason, we deny the request for the sanctions under Fed.R.App.P. 38 and Circuit Rule 38.

1. By letter pursuant to Fed.R.App.P. 28(j) and circuit Rule 28(j), the Bowmans submitted two reports one from the District Attoney of San Diego, California and one from the Sheriffs Department of Ventura County, California. These documents were never presented to the district court. Waste filed a motion to strike these documents. sy order of this Court, the submission and subsequent motion were submined to the merits panel for determination. Fed.R.App.P. 28(j) and circuit Rule 28(j) deal only wilh citation of supplemental *authority.* since these reports constitute additional evidence and not authority they are not properly

submitted under these rules. See *Trans-Sterling, Inc. v. Bible,* 804 F.2d 525, 528 (9th Cir. 1986). Therefore, we grant the motion to strike.

2. Section 1983 imposes civil liability only upon persons who "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws...." 42 U.S.C. 1983.

3. In addition, though the district court did not rely on it, the Tax Injunction Act limits the power of the district court to restrain state officers from collecting taxes where an adequate remedy is afforded the taxpayer under state law. 28 U.S.C. 1341. Such remedies exist in this case. In fact, the Bowmans made use of these remedics to challcnge the $89,312.09 assessmcnt in a Wisconsin state court, which annulled the assessment as improperly calculated. Because the "secret" assessment has never been billed, no ripe claim can be made relating to it. Howevcr, because of the cumbersome way that Franklin rccorded thc assessmcnt, it could amount to a lien on thc property, impairing markctability. As pointed out in oral argument, the proper method for dealing with that potential problem would be a quiet title action. conclusions are supported by facts that make them cognizable Constitutional claims.

Because the Bowmans did not assert this lien theory anywhere in their complaint, it is not directly before us in this appeal.

4. Subsection (1) is inappropriate in this case because il applies only to conspiracies to prevent federal officers from performing their duties. No failure to carry out duties on the part of a federal officer is alleged by the Bowmans. Subsection (2) is similarly

inappropriate because it applies only to conspiracies to obstruct justice by intimidating a party, witness or juror. The Bowmans allege no such intimidation. Therefore, subsection (3) remains as the most likely basis for the Bowmans' claim because it provides that damages may be recovered by those injured by a conspiracy to deprive persons of equal protection or of equal privileges and immunities under the laws. 42 U.S.C. 1985(3)

5. Their situation bears some resemblance to that of *Askew v. Bloemker* in which "status as a 'class' of victims depends entirely upon the defendants' actions, and it is not possible for defendants to have conspired to discriminate againSt a class that did not even exist until after they had acted." 548 F.2d 673, 678 (7th Cir. 1976).

6. The Scott Court, concerned that "[s]uch a con struction would extend § 1985(3) into the economic life of the country in a way that we doubt that the 1871 Congress would have intended ..." refused to "construe § 1985(3) to reach conspiracies motivated by economic or commercial animus," in that case activity by a union against a company that had hired non-union workers. *Id.*, 463 U.S. at 837-38, 103 S.Ct. at 3360-61 .

III.

For the foregoing reasons, the judgment of the district court dismissing the Bowmans' claims with prejudice as to all defendants is AFFIRMED and the MOTION FOR SANCTIONS IS DENIED.

United States District Court

Eastern District of Wisconsin

Loretta Bowman and
William H. Bowman,
William H. Bowman, Jr.,
Thomas Bowman, Susan Bowman,
John Bowman and Joseph Bowman,

Plaintiffs,

vs. Civil No. 91-C-829

City of Franklin,
J.C. Zimmerman Engineering Corp.,
Waste Management of North America,
Inc., and Waste Management of
Wiscon sin, Inc.,

Defendants.

TRANSCRIPT OF CONFERNCE CALL ON
MOTIONS TO DISMISS
(Including only opinion of court pp. 19-33)

Record made in the above-entitled matter before the

Honorable J. P. Stadtmeuller, Judge of said Court on

November 25, 1991, commencing at 9:33a.m.

Well, as I indicated at the outset, the court has reviewed the written materials that have been submitted by Waste Management of Wisconsin and the parent, Waste Management of North America; and I believe your comments this morning have been helpful in the

and I believe your comments this morning have been helpful in the court's addressing the merits of the motion.

The following constitutes my decision with regard to the motion; and at the conclusion of my remarks I will simply direct the prevailing party to submit a short order for the court referencing this morning's hearing as well as the written materials that the court has had an opportunity to consider with regard to the motion to dismiss.

By way of factual background, it appears from the written submissions as well as cousel's comments that Waste Management owns and operates a landfill in the City of Franklin. Because the current site is expected to reach capacity in a period of time, less than ten years, Waste Mangement has begun making arrangements to expand this landfill site.

One of Waste Management's concerns relates to the disposal of leachate. The current site appearently produces some 50,000 gallons of leachate a day; and in order to dispose of this leachate , Waste Management trucks it from the landfill site to a Milwaukee Metropolitan Sewerage District treatment plant. Expanding the landfill obviously will result in more leachate and commensurate higher trucking costs. To avoid these costs, Waste Management enlisted the aid of the City of Franklin and its consulting engineer, J.C. Zimmerman Engineering Corporation, to develop an alternative to connect the landfill to the Milwaukee Metropolitan Sewerage District.

The City of Franklin prior to being approached by Waste Management had already embarked on a comprehensive sewer plan for the City commonly referred to as the Central City Sewer which would also connect with the Milwaukee Metropolitan Sewerage District. Once that Central City Sewer project had been completed, Waste Management's approach would be to construct a force main which would allow the leachate to be transported through the sewer flow from the landfill to the Central City Sewer.

In August of 1988 Waste Management formally requested the City of Franklin to connect its landfill to the proposed Central City Sewer. At the same time, it informed the City that it had hired J.C. Zimmerman Engineering Corporation as its project engineer. On November 3rd of 1988 J.C. Zimmerman submitted to the City of Franklin a "Report on Special Assessments" detailing the cost of teh

Central City Sewer and anticipated property assessments.

The report pointed out both that the Central City Sewer would have to be redesigned to accomodate industrial waste and that Waste Management was prepared to pick up the tab for the additional costs associated with these modifications. It is also noted that the property owners who have granted sewer easements such as the Bowmans would not be assessed for the sewers installed on their easement until a city street is built on the easement or the sewer becomes a local sewer in a planned development.

On November 28th of 1988 the City held a public hearing on the proposed Central City Sewer. At that hearing the City distributed a flier disclosing, first, that Waste Management had requested that the landfill be connected to the Central City Sewer; second, that Waste Management would pay the cost of lining the Central City Sewer to accommodate the flows from the landfill; and, third, that the City would charge Waste Management a sizable connection fee which would be used to reduce future property tax assessments.

On December 6th the Franklin Common Council authorized the construction of the Central City Sewer and at the same time levied assessments to cover the costs associated with the construction. In addition, the Council also approved a contract with Waste Management calling for a $600,000.00 payment to the City's general fund as a fee to hook up the lateral from the dump site or landfill site to the Central City Sewer.

Thereafter, the plaintiffs in this case, the Bowmans, were assessed some $89,312.09 for the installation of the Central City Sewer abutting their property; and at the same time the City recorded but did not bill a second assessment of $51,187.00 for a sewer laid in the easement across their property.

As I noted earlier, the trunk sewer assessment is a deferred assessment; that is, the plaintiffs will not be billed for this assessment until they or a future owner derive some benefit from the sewer. And for that to occur based upon the court's review of the parties' written submissions, one of two things must occur; that is, either a public street has to be built on the easement or the sewer has to accommodate the development of two or more properties located within the easement tract.

With regard to the $89,000 assessment, I would note

parenthetically that that assessment was reduced to $82,407.59 after the Bowmans challenged the assessment in a state court proceeding and the court determined that an error was made in the computation and annulled the assessment which was recomputed.

In filing their action, the Bowmans contend that they were neither given notice of the trunk assessment nor told that the trunk sewers may be used to carry hazardous waste from the landfill. They contend that the City of Franklin "bartered its police power" to Waste Management in return for a $600,000 connection fee and an agreement to indemnify the City for any damages and a free forced main connecting the landfill to the Central City Sewer. They also assert that the sewer easement across their property was not valid because it was not signed by all of the property owners. As a prelude to this action the Bowmans served the City of Franklin with a claim for damages in February of 1991. Since no response was forthcoming to their claim, the claim is deemed to have been denied.

With regard to the standard appropriate to a motion to dismiss, I find that the Seventh Circuit's comments in Gibson v. City of Chicago at 910 F.2d 1510 at page 1520, Seventh Circuit case from 1990, quoting Triad Associates v. Chicago Housing Authority, 892 F.2d 583 at page 586, the Seventh Circuit case from 1989, and I quote, "The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." The allegations of the complaint and any reasonable inferences that can be drawn from them must be taken as true, citing Hishon v. King & Spauldina, 467 U.S. 69 at page 73, a 1984 U.S. Supreme Court case.

Dismissal under Rule 12(b)(6) is appropriate "only if the plaintiff has failed to allege any set of facts upon which relief may be granted," citing Yeksigian v. Nappi, 900 F.2d 101 at page 102, again a Seventh Circuit case from 1990.

Although in their complaint the Bowmans do not specify which provision of section 1985 Waste Management has purportedly violated, given the violations in their complaint, I find that it is most likely section 1985(3); noting that section 1985(1) renders actionable a conspiracy to interfere with the duties of federal officers, section 1985(2) a conspiracy to impede justice, and, finally, section 1985(3) a conspiracy to deprive a person or class of persons of equal protection.

To state a claim under section 1985(3), a plaintiff must allege, first, a conspiracy; second, for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or equal privileges and immunities under the laws; and, three, an act in furtherance of the conspiracy; and, finally, fourth, whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States, citing United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825 at pages 828 and 829, 1983 U.S. Supreme Court case.

As I view plaintiffs' allegations with regard to their claim under section 1985, I find a problem in their meeting the requirement with regard to the second element; that is, the protected class. The Bowmans contend that they are members of a class consisting of the owners of eight farms wrongfully assessed for construction of the trunk sewer. Obviously, "wrongfully assessed farm owners" do not constitute a protected class under section 1985(3).

Recent decisions from the U.S. Supreme Court and the Seventh Circuit make it more than clear that section 1985(3) does not reach conspiracies motivated by economic or commercial concerns, citing Scott at page 838, or by one's political views, citing Grimes v. Smith, 776 F.2d 1359 at 1366, a Seventh Circuit case from 1985.

Rather, this statute applies solely to conspiracies motivated by race or some other class-based animus, again citing Scott, 463 U.S. at 836 and 837, Grimes at 776 F.2d at 1366. I also note Griffin v. Breckenridge, 403 U.S. 88 at page 102, 1971, as well as Tomkins v. Tinley Park, 566 F.Supp. 70, it's a case from the Northern District of Illinois in 1983 in which the court found that a conspiracy between a municipality to the detriment of adjoining property owners does not state a claim under section 1985.

In my view since the Bowmans have not and, more importantly, cannot allege any racial or class-based discrimination, their 1985 claim against Waste Management must be dismissed.

The next question relates to whether or not the court ought also dismiss the section 1985 claims against the City of Franklin as well as J.C. Zimmerman Engineering Corporation. Although sua sponte dismissals without prior notice and an opportunity to be heard are generally frowned upon, citing Tamari v. Bache & Company,

(Lebanon) S.A.L., 565 F.2d 1194 at page 1198, Seventh Circuit 1977, cert. denied, 435 U.S. 905, 1978, the Seventh Circuit has acknowledged and indeed been willing to permit such dismissals 'so long as a sufficient basis for the court's action is apparent from the plaintiff s pleading,' citing Doe on Behalf of Doe v. St. Joseph's Hospital, 788 F.2d 411 at page 414, Seventh Circuit case from 1986.

The court's reasoning is that "the proper administration of justice requires that a trial judge have substantial control over the proceedings before him," again citing Doe, 788 F.2d at 415, quoting from Flora v. Home Federal Savings & Loan Association, 685 F.2d 209 at page 212, again a Seventh Circuit case from 1982.

As I've already indicated, based upon the court's review of the extensive written submissions by Waste Management and the Bowmans on the motion to dismiss, I conclude that the Bowmans cannot state a claim under any circumstances relating to the factual underpinnings of this case under section 1985.

It is also my view that they have indeed been given notice and an opportunity to be heard on the general matter of dismissal of their 1985 claim, and I am left with no other conclusion than this cause of action under 1985 cannot stand as against the City of Franklin or J.C. Zimmerman Engineering Corporation. And, accordingly, I do herewith dismiss outright the 1985 claim as against the City of Franklin and J.C. Zimmerman Engineering Corporation.

Next, I want to turn to plaintiffs~ section 1983 claim. To state a claim under section 1983, a plaintiff must allege that, first, he was deprived of a federally protected right; second, by a person acting under color of state law, citing Gomez v. Toledo, 446 U.S. 635 at page 640, a 1980 U.S. Supreme Court case. Waste Management contends that the Bowmans' claims do not satisfy either prong.

Private persons generally do not act under color of state law. In certain situations, however, a private person will be subject to liability under section 1983. One of these is when a private individual willfully participates in a conspiracy with the state or one of its agents, citing Moore v. Market Place Restaurant, Incorporated, 754 F.2d 1336 at page 1352, Seventh Circuit case from 1985.

Establishing state action, however, requires the plaintiff to do more than just allege a conspiracy with a state agent, citing Leahy v. Board of Trustees of Community College District No. 508, 912 F.2d

917 at page 922, again a Seventh Circuit case from 1990. There must be some factual allegation suggesting a "meeting of the minds," that is, a mutual agreement among the defendants to deprive the plaintiff of his constitutional rights, citing Sparkman v. McFarland, 601 F.2d 261 at page 268, a Seventh Circuit per curiam opinion from 1979, Judge Sprecher having written a concurrence.

The Bowmans allege the defendants conspired to deprive them of the use and enjoyment of their land, arguably via violation of their property rights under the Fifth and Fourteenth Amendments. But even accepting these allegations as true, there is nothing that suggests that Waste Management conspired with the City to achieve that result.

All Waste Management did was request that its landfill be connected to the proposed Central City Sewer system, and Waste Management had nothing to do with the Central City Sewer system, nor the route of waste through that system. Likewise, I find it patently absurd for the plaintiffs in this case to suggest that Waste Management somehow conspired with the City to conceal the trunk sewer assessments or the fact that the Central City Sewer system would carry leachate from the landfill.

It is evident that Waste Management did not levy the assessments and played no role in their computation. Moreover, it is clear from the exhibits that have been submitted by the Bowmans in response to the motion to dismiss that the assessments and the nature of the waste produced by the landfill were disclosed both in the J.C. Zimmerman report, which was available for inspection, as well as the November 28th, 1988, public hearing.

Having cut through all of the felgergarb, it becomes more than apparent to this court that the Bowmans are displeased because they are unable, at least at the moment, to sell their property unless they go about developing it themselves; and in that event they will be obliged to pay the trunk sewer assessment. Suffice it to say, that in my view does not amount in any way to a constitutional violation under section 1983.

Finally, the Bowmans have two separate alleged state law claims, one dealing with trespass and the second their apparent inability to find a buyer for the property due to the pending assessment being billed if the property is developed. The Waste

Management defendants suggest that these state law claims must also be dismissed because there is no independent basis for federal jurisdiction, citing United Mine Workers v. Gibbs, 383 U.S. 715, which is a 1966 U.S. Supreme Court case.

The court based upon its review of the authorities submitted by the parties, first beginning with the trespass claim, I find that the Bowmans do not allege that the force main constructed at the request of Waste Management crosses their property, only that a trunk sewer is embodied under the easement.

In an attempt to salvage their argument with regard to these state-related claims, the Bowmans assert that Waste Management is trespassing by virtue of the fact that its leachate may flow through the trunk sewer. However, the Bowmans cite no legal authority for their position; and frankly, carried to its logical conclusion, it would mean that anyone who has waste running through a sewer would be considered in their view a trespasser. I find that argument to be less than ingenuous and find no basis to allow the state trespass claim to go forward.

Similarly, there is even less reason for the court to consider as viable their final claim with regard to their inability to sell the property because of the pendency of a potential assessment as amounting to a claim for relief under state law. Accordingly, I find no basis for these state law claims to go forward independent of the other claims that I have already dismissed.

One final note, the Bowmans also argue that the court has diversity jurisdiction and their claims in spite of the court's dismissal of the 1985 and 1983 claims ought to be allowed to go forward. However, there is a fatal flaw in the Bowmans' argument on this point, and that is the fact that one of the plaintiffs, Susan Bowman, and one of the defendants, Waste Management of North America, are both citizens of Illinois. Thus we do not have in this case complete diversity.

So based upon my ruling, Ms. Munroe, I would ask that you prepare an order for the court's signature dismissing your client as well as the City and J.C. Zimmerman as to the 1985 claims. The matter with regard to the 1983 claims I believe based on the record that has been made also ought be dismissed as asainst the City of Franklin as well as J.C. Zimmerman Engineering Corporation.

And since the entirety of this case is ripe for dismissal, I'm going to ask that you simply prepare an order including the 1983 claims against J.C. Zimmerman Engineering as well as the pending state claims and also reference the fact that the recently filed motion for summary judgment on behalf of J.C. Zimmerman Engineering, that is, the motion filed on November 12th, is denied as moot since I've already denied or granted on the court's own motion the functional equivalent of a motion for summary judgment by incorporating Waste Management's motions for dismissal which transcend the summary judgment motion.

Insofar as the motion for costs and attorneys' fees either under Rule 11 or section 1988, given the fact that the court had previously scheduled the hearing on the motion to dismiss back on September the 9th and the motion for summary judgment was not filed until November the 12th, I'm going to deny both the Rule 11 motion as well as the motion for costs and attorneys' fees filed under section 1988 by J.C. Zimmerman Engineering Corporation since they in my view have waited until the motion to dismiss was adjudicated by the court. There was no requirement or deadline for filing motions for summary judgment. And, finally, the motion to dismiss that I have granted is also without costs and without attorneys' fees.

So that constitutes the entirety of the court's decision; and, Ms. Munroe, you have the principal responsibility of preparing an appropriate order for the court's signature based on the hearing this morning. Thank you for all being available, and thank you for your written submissions. Court stands in recess.

(Proceedings concluded at 10:36 a.m.)

CERTIFICATE

I, Christine L. Petrie, Official Court Reporter, United States District Court, Eastern District of Wisconsin, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 6th day of December 1991.

Chistine L. Petrie, RPR-CM
Official Court Reporter

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 4, 1993

Before
Hon. Wiliam J. Bauer, Chief Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Jesse E. Eschbach, Senior Circuit Judge

LORETTA BOWMAN,
WILLIAM BOWMAN,
WILLIAM BOWMAN, JR.,
et al.,
Palintiffs-Appellants

v.

No. 91-3887
CITY OF FRANKLIN,
J.C. ZIMMERMAN ENGINNERING
CORPORATION, WASTE
MANAGEMENT OF WISCONSIN,
INCORPORATED, et al.,
Defendants-Appellants

ORDER

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 91-C-829

J.P. Stadtmueller, Judge.

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiffs-appellants, all of the judges on the panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

AMENDMENTS V & XIV
TO THE UNITED STATES CONSITUTION &
43 U.S.C. 1983 & 1985

AMENDMENT V

Criminal Proceedings and Condemnation of Property

[Section 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment on indictment of a grand jury, except in cases arising in the land or navel forces, or i the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeporady of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use withour just compensation.

AMENDMENT XIV

Citizenship, Representation, and Payment of Public Debt

Citizenship

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United States; nor shall any stste deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C § 1983

Civil Action for Depreivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

privileges, or immunities secured by the Constitution and laws, shall be liable to the injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R. S. § 1979; Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284.)

42 U.S.C § 1985

Conspiracy to Interfere with Civil Rights

(1) Preventing Officer From Performing Duties. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his offical duties;

(2) Obstructing Justice, Intimidating Party, or Juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having attended or testified, or to influence the verdict, presentment, or indictment of nay grand or petit juror in any such court, or to injure such juror in his person or property on account of the verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hinderingm obstructing, or defeating in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce,

the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving Persons of Rights or Privileges. If two romore persons in any State conspire for the purpose of depriving, either directly or indirectly, any person of the equal protection of the laws, or of equal privileges and immunities under the laws,; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to b e done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizrn of teh United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against anyone or more of the conspirators. (R. S. § 1980.)

WISCONSIN STATUTES
SECTIONS 66.60 (12) (a), 66.60 (12) (e), 66.60 (15)

66.60 (12) (a) "If any person having interst in any parcel of land affected by any determination of the governing body,...that person feels aggreived thereby (he) may, within 90 days after the date of the...publication of thre final resolution...appeal therefrom to the circuit court of the county in which shuch property is situated. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings...and shall transmit the same with the original or certified copies of all the papers in the matter to the clerk of the circuit court." (Emphasis supplied)

66.60 (12) (e) "An appeal under this subsection shall be the sole remedy of any person aggrieved by a determination of the governing body."

66.60 (15) "Every special assessment levied under this section shall be a lien on the property against which it is levied."